

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

GUEST TEK INTERACTIVE)
ENTERTAINMENT LTD.,)
)
Plaintiff,)
) C.A. No. 18-1394(RGA)
v.)
)
NOMADIX, INC.,)
)
Defendant.)

Thursday, September 3, 2020
2:01 p.m.
Discovery Dispute
Videoconference

BEFORE: THE HONORABLE RICHARD G. ANDREWS, U.S.D.C.J.

APPEARANCES:

MORRIS NICHOLS ARSHT & TUNNELL LLP
BY: JENNIFER YING, ESQUIRE

-and-

BAKER & HOSTETLER LLP
BY: CHARLES C. CARSON, ESQUIRE
BY: ANDREW SAMUELS, ESQUIRE

For the Plaintiff

1 APPEARANCES CONTINUED:

2 MORRIS JAMES LLP
3 BY: CORTLAN S. HITCH, ESQUIRE

4 -and-

5 KNOBBE MARTENS OLSON & BEAR, LLP
6 BY: MARK LEZAMA, ESQUIRE
7 BY: ANDREA L. CHEEK, ESQUIRE

8 For the Defendant

9 *** PROCEEDINGS ***

10 THE COURT: Good afternoon. This is Judge
11 Andrews in *Guest Tek versus Nomadix*, Civil Action Number
12 18-1394. I see my deputy clerk and my court reporter on the
13 line.

14 I'm assuming, though I do not see her, that
15 Ms. Ying is on the line representing the plaintiff, or maybe
16 somebody else is on the line representing the plaintiff.

17 MR. CARSON: Your Honor, this is Charles Carson.
18 I'm on the line representing the plaintiff, Guest Tek, but I
19 believe she is on the line as well.

20 MS. YING: Your Honor, this is Jennifer Ying
21 from Morris Nichols. I apologize, I forgot to unmute the
22 application itself. I am on the line for plaintiff, Guest
23 Tek, and I also am joined by my co-counsel, Chuck Carson and
24 Andrew Samuels from Baker Hostetler.

25 THE COURT: Okay. Thank you, Ms. Ying. I
assumed you were out there somewhere.

1 And is Mr. Dorsney on the line?

2 MR. HITCH: Good afternoon, Your Honor. This is
3 Cortlan Hitch instead of Mr. Dorsney on behalf of Nomadix
4 from Morris James. With me I have co-counsel, Mark Lezama
5 and Andrea Cheek from Knobbe Martens. And I believe also on
6 the line is Kelly Hughes. Mr. Hughes is Nomadix's general
7 counsel and will just be listening in.

8 THE COURT: Okay. So good afternoon to you all.
9 I read the four letters you submitted, Docket Items 109,
10 110, 111, 112, and I have considered what I understand from
11 those various letters. And so I had a couple just general
12 questions because there's some amount of background I just
13 want to make sure that I sort of have in my mind in
14 determining all these things. But basically once I get
15 through the background, what I was planning on doing was
16 going to the proposed orders that you all have submitted and
17 kind of using that as a guide for discussion.

18 So generally there's Canadian litigation over
19 some kind of Canadian counterpart patent. Does that have
20 any date coming up in the future where the judge in Canada
21 is likely to decide the issues?

22 MR. LEZAMA: Your Honor, this is Mark Lezama for
23 defendant, Nomadix. Yes, there is a -- there's a bench
24 trial scheduled to begin September 28th, and it's a long
25 one. I believe it's scheduled to end October 16th.

1 THE COURT: Okay. And would I be correct in
2 assuming that essentially that will have no impact, no
3 matter what the judge there decides, on what we're doing
4 here; is that right?

5 MR. LEZAMA: Yeah, I would agree that on the
6 merits, the decision of that case will not affect the merits
7 of this case.

8 THE COURT: All right. So now there's also some
9 litigation going on in California; is that right?

10 MR. LEZAMA: That is correct.

11 THE COURT: And I'm guessing that's not patent
12 litigation, that's something else?

13 MR. LEZAMA: It is a breach of contract action,
14 breach of a patent license agreement. So those are
15 Nomadix's patents in that case.

16 THE COURT: Ah, okay. All right.

17 So realistically the decision in that case isn't
18 going to have any impact on this one, either; right?

19 MR. LEZAMA: Unlikely.

20 THE COURT: Okay. All right.

21 So when did Nomadix start selling the products
22 that are accused which I understand to be, at least based on
23 the complaint, Nomadix Access Gateways 2400, 2500, 50 --
24 well, 600 -- I can't read my own writing -- 5800, 5900, as
25 well as software called Nomadix Service Engine and at least

1 versions 8.7 through 8.11? When did you all start selling
2 that?

3 MR. LEZAMA: So those specific -- I think the
4 limiting factor would be the version number, and I believe
5 8.7 was released in October 2016 if I -- I may have that
6 wrong, but I believe that to be the case.

7 THE COURT: Okay. Well, and I saw 2016 in one
8 of the proposed orders. And that's kind of what I was
9 wondering is if the period of infringement that's alleged
10 essentially begins in 2016, and I take it from what you're
11 saying, Mr. Lezama, the answer, at least in your mind, is
12 yes?

13 MR. LEZAMA: That is my understanding. Just to
14 clarify, though, those models have been on sale before that,
15 you know, just not that version of software. And Nomadix
16 has been selling gateways, you know, for more than 20 years,
17 and so there are predecessor versions of that as well.

18 MR. CARSON: Your Honor, I can confirm that the
19 earliest version of the software that Guest Tek is accusing
20 was released in October 2016.

21 THE COURT: Okay.

22 MR. CARSON: So it's the boxes and the software
23 since that date that are accused of infringement.

24 THE COURT: Now, I have the impression from the
25 letters that since the complaint was filed, Nomadix has --

1 updated may not be the right word, but has subsequent
2 versions of its software and maybe of its -- if the access
3 gateway is a hardware. So are there new model numbers that
4 are now in this litigation by agreement of both parties?

5 MR. CARSON: Your Honor, we served supplemental
6 paragraph 4A disclosures a few months ago that added the
7 more recent versions. So that would be 8.12, 8.13, and
8 8.14. And there's also a newer box. I believe it's the EG
9 6000 that we also added.

10 THE COURT: Okay. And I take it the parties are
11 in agreement that those things are now in the case as
12 accused products?

13 MR. LEZAMA: Yes.

14 THE COURT: Okay. Good.

15 All right. So I also saw somewhere in the
16 briefing that Guest Tek has dropped three patents, the '599,
17 the '41 maybe nine and the '846.

18 Is that right?

19 MR. CARSON: Yes, Your Honor. We're currently
20 asserting three patents.

21 THE COURT: Okay. So I don't know. I doubt
22 that it makes any difference here, but I had a total of five
23 others left. Which are the other two you're dropping? Or
24 maybe tell me what the three are that are left.

25 MR. CARSON: That will be easier, Your Honor,

1 here on the spot, although I could get the numbers we
2 dropped. The three that we're keeping are the '435, the
3 '738, and the '681 patents.

4 THE COURT: Okay. So you've dropped the '184
5 and the '640. But in any event, there's nothing actually in
6 the record to say that you've dropped these five patents, is
7 there?

8 MR. CARSON: Well, there is our most recently
9 supplemented paragraph 4A disclosures.

10 THE COURT: Okay. But you don't file those with
11 the Court.

12 MR. CARSON: No. No. Those were served on the
13 other party. We have -- there's nothing -- other than our
14 notice of service of that document, there's nothing in the
15 Court's docket that reflects this.

16 THE COURT: Well, so why don't you clean up the
17 record by submitting something indicating that those five
18 patents are now out of the case. You can work maybe -- I
19 mean, that would be helpful. Okay. And we talked about
20 accused products.

21 All right. And so I take it, also, dealing with
22 one of the perhaps less disputed points is basically if I
23 continued the discovery until October 30th, given that I've
24 already built enough space into the schedule so that you can
25 bump everything else back by six weeks or so and still give

1 me the amount of time that I like to have to deal with your
2 summary judgment motions and Daubert motions and still have
3 the trial date that I've given you in September of 2021 --
4 you know, I know one side or the other wanted to put
5 conditions on this, but can't we just agree that we'll do
6 that?

7 MR. CARSON: That's fine with the plaintiff,
8 Your Honor.

9 MR. LEZAMA: So Nomadix's position -- I guess I
10 should say we probably need to back off a little bit from
11 the position that we expressed in the letter. The Canadian
12 court was setting the schedule for the trial roughly
13 simultaneously as we were preparing that letter. We didn't
14 fully appreciate the impact of that case schedule on our
15 discovery schedule here.

16 And our strong preference is just to finish up
17 discovery by the 22nd as planned because it's going to be a
18 three-week long trial in Canada that's going to occupy a
19 significant amount of time of Nomadix's employees and
20 Nomadix's general counsel, the 15 individuals who are most
21 likely to be involved in discovery here in the Delaware
22 case. And it's a huge time commitment for them in Canada.
23 You know, we need to get them back to work. We would -- it
24 would be our strong preference to wrap up discovery as
25 originally scheduled.

1 THE COURT: Well, so I have a feeling that's
2 probably not going to be possible, but why don't we hold
3 that thought and move on to these more specific disputes
4 because I think I can resolve them or hopefully resolve most
5 of them.

6 So I'm going to deal first with Guest Tek's
7 letter which raised various issues. And so Guest Tek wants
8 you, Nomadix, to produce and then it has a list of by
9 September 11th of 2020, though there's no particular magic
10 on a date. And in fact, that seems kind of unrealistic if
11 there's actually much for you to do here.

12 But in any event, they want you to produce
13 various things, and the first nine of them have to do with
14 financial documents. And I think what they're trying to do
15 is, you know, get information that's necessary for their
16 damages expert to perform a reasonable royalty analysis.
17 And their complaint seems to be mostly that you've produced,
18 you know, a four-page document for each year that purports
19 to be all the information they need or maybe it doesn't
20 purport to be.

21 Do I have the general gist of what the dispute
22 is here right?

23 MR. CARSON: Your Honor, you do. What they've
24 produced, though, is not four, four-page documents, but four
25 single-page documents.

1 THE COURT: Oh.

2 MR. CARSON: Those are annual profit loss
3 statements. They're single-page documents. They're
4 companywide. We've got those documents.

5 There are additional financial documents, none
6 of the documents that we identify in our letter. There are
7 a very large collection of individual purchase invoices
8 that --

9 THE COURT: Well, so let me ask you about that
10 because if I wanted -- who are Nomadix's customers? Are
11 they businesses? Individuals? Who buys these gateways and
12 the software?

13 MR. CARSON: Are you asking me that, Your Honor,
14 or are you --

15 THE COURT: Well, I'm asking anybody who knows
16 the answer.

17 MR. CARSON: Okay.

18 MR. LEZAMA: I can respond, Your Honor. So
19 Nomadix's customers are distributors and resellers, so
20 that's who we sell the devices to --

21 THE COURT: Well, who do the --

22 MR. LEZAMA: -- ultimately.

23 THE COURT: -- distributors and resellers sell
24 it to?

25 MR. LEZAMA: So ultimately the resellers will

1 tend to sell them in a couple of different verticals. One
2 of those verticals is the hospitality industry. So there
3 are a lot of hotels that have Nomadix's gateways installed.
4 And there are also, you know, other businesses that could be
5 cafes. They could be university campuses. They could be
6 apartment complexes, condominiums, and things like that, but
7 we don't deal with those entities. We have our distributors
8 and resellers.

9 THE COURT: And so does Nomadix sell products
10 other than the accused products in this case?

11 MR. LEZAMA: Very few. So there are one or two
12 product lines that are not accused and for which we have
13 very small sales.

14 THE COURT: Okay.

15 MR. LEZAMA: So --

16 THE COURT: So when a distributor buys a -- do
17 they buy sort of individual gateways with a software
18 package?

19 MR. LEZAMA: That's correct.

20 THE COURT: So what kind of price range are we
21 talking about if I'm a distributor, and I want to buy one of
22 these things from you?

23 MR. LEZAMA: It depends on the model and the
24 software that's purchased, but it's generally, you know, [REDACTED]
25 [REDACTED], kind of somewhere in that range.

1 THE COURT: Okay. And generally speaking, how
2 many of these units are you selling in a year like 2019?

3 MR. LEZAMA: You know, I hesitate to give a
4 number because I'm not sure it would be accurate.

5 THE COURT: Well, give me --

6 MR. LEZAMA: I apologize.

7 THE COURT: So I'm not holding you to be
8 accurate, but give me an order of magnitude.

9 MR. LEZAMA: I mean, I think it would be [REDACTED]
10 [REDACTED].

11 THE COURT: Okay. And Mr. Carson, have you
12 gotten any discovery on how much of these units they've
13 sold, or is this the first time you're ever hearing what
14 this is?

15 MR. CARSON: We did serve an interrogatory
16 response, and they did provide some of this raw units and
17 sales data. It's specific to the boxes, though, and we
18 understand that there is a separate or related revenue
19 stream with respect to the software.

20 So we don't have the software piece. We only
21 have the boxes. And even that particular data, that
22 doesn't -- you know, that only goes to units and revenue.
23 It doesn't address the cost associated with those, and so it
24 doesn't address the compensability.

25 THE COURT: Well. So yeah, Mr. Carson, I'm just

1 trying to get a handle here because one of the things
2 somebody, Nomadix said is proportionality. And they said,
3 well, it costs \$90,000 to do some discovery that they've
4 already done. But it's hard to have proportionality unless
5 you know what the denominator is or at least have an idea
6 what it is. So that's the reason I'm asking.

7 So Mr. Lezama, not holding you to these numbers,
8 but when you say [REDACTED] -- I think you said [REDACTED]
9 units, that's of all the different models in a single year.
10 So --

11 MR. LEZAMA: That's correct.

12 THE COURT: -- like if I took [REDACTED] and
13 multiplied it by [REDACTED], and [REDACTED]
14 [REDACTED] a year?

15 MR. LEZAMA: No, I think it's more. I said
16 [REDACTED] actually, so --

17 THE COURT: But somewhere like in the [REDACTED]
18 [REDACTED] range is probably --

19 MR. LEZAMA: Yes.

20 THE COURT: -- the gross revenues from all the
21 sales of all of these in a year?

22 MR. LEZAMA: Yeah, if you're not holding me to
23 it, that sounds like in the ball park.

24 THE COURT: Okay. So you know, Mr. Carson asked
25 or wants me to consider the relevant question here which is:

1 Do you have a sense of what the ball park of profits are?

2 MR. LEZAMA: I don't personally. I mean, I'm
3 sure Nomadix does. The --

4 THE COURT: Well, so you've given him a one-page
5 sheet that's supposed to be the financial information for a
6 year. And it seems to be the case that the sale of the
7 accused products is going to be, you know, 95 percent of
8 whatever the one-year numbers show. I'm assuming somebody
9 on your side has looked at the piece of paper you gave them
10 or paper -- you can tell my age when I say paper. But
11 you've looked at the numbers.

12 I mean, or Mr. Carson, you've got a page.
13 Presumably it shows something that represents profit. I
14 don't want you to tell me the specific number that's written
15 down, but what kind of a ball park are we talking about? I
16 would imagine that if we ball parked [REDACTED] in
17 revenue, you know, profits are probably, you know, [REDACTED]
18 [REDACTED] plus or minus.

19 MR. CARSON: Well, we attached one of these
20 profit loss statements as an exhibit to our brief last week,
21 and that's a statement which I'm looking at right now for
22 the -- I guess the calendar year ending December 2016. So
23 this is a while back. And you know, the total operating
24 profits --

25 THE COURT: So December of 2016 when they only

1 started in October of 2016, that's not the best year to be
2 looking at. Do you have a different year?

3 MR. CARSON: Well, that's the sample that we
4 provided to you so that you'd have a sense of the document
5 that we got. I can certainly get that.

6 THE COURT: Well, so I didn't look at that
7 document.

8 MR. CARSON: Okay.

9 THE COURT: That's the reason why I'm asking
10 now.

11 MR. CARSON: I can pull it up very quickly if
12 you can hold on just a moment.

13 THE COURT: Well --

14 MR. CARSON: I --

15 MR. LEZAMA: While he's doing that, I just want
16 to make clear that, you know, we don't necessarily agree
17 with their characterization of that, that that's the extent
18 of what we've produced that's relevant here.

19 THE COURT: Yeah. So you know, I don't really
20 expect them to take all your invoices -- and I understand
21 you say, well, they asked for it. I don't really expect
22 them to take all your invoices and put them together and
23 reconstruct your financial records. So you know --

24 MR. LEZAMA: We have produced annual sales
25 reports and --

1 THE COURT: Can you tell the profit that you
2 make on the sale of these things from those?

3 MR. LEZAMA: I don't think so.

4 THE COURT: Yeah. So that's my impression is
5 you said in your letter, We don't keep track of profits
6 which, you know, strikes me that most businesses who don't
7 keep track of profits don't stay in business very long. But
8 maybe Nomadix is different.

9 Is it really the case that you all don't keep
10 track of profits?

11 MR. LEZAMA: Well, I think there is a
12 misunderstanding here. What they have asked for and what
13 they're seeking is documents that specify our profits on a
14 per-product basis. So you know, we do not have that. That
15 would require a substantial analysis. It's a very stable
16 business that we have that -- you know, we've been doing
17 this for 20 years. We know what our costs are. And we
18 know, you know, how profitable it is.

19 And as you pointed out, you know, the vast
20 majority of our business is the sale of these gateways. And
21 so we don't know, you know, how much. We don't have
22 documents that analyze what's the profit on 18 2,500 versus
23 the 5600. That's my understanding after multiple
24 discussions with the client.

25 THE COURT: So if Mr. Carson, his expert down

1 the road says, well, they don't keep track of profits on a
2 per-unit basis, so I just took the profit margin for the
3 company as a whole which is, you know, 95 percent based on
4 these things. And I took the prices for which they're sold
5 and I just pro rata distributed the products, would you say,
6 yep, that's a fine method of analysis?

7 MR. LEZAMA: No, I don't know that we
8 necessarily would agree with that. We have to consult with
9 Nomadix and talk to our expert and see if that's valid, but
10 that's not really the point respectfully. I mean, we're
11 talking about document production. They have multiple other
12 avenues of getting this discovery. We just can't produce
13 what we don't have. I mean --

14 THE COURT: Yes. Well --

15 MR. LEZAMA: -- we can only produce --

16 THE COURT: What is the other avenue you'd like
17 to propose for them to find this out?

18 MR. LEZAMA: Well, they could serve
19 interrogatories. They could take our deposition. I mean,
20 we have less than three weeks to go in the fact discovery
21 period, and they haven't noticed a single deposition.

22 THE COURT: Okay. All right. So --

23 MR. CARSON: Your Honor.

24 THE COURT: -- Mr. Carson, did you want to say
25 something?

1 MR. CARSON: Yes. I just wanted to address that
2 point a bit here. So you know, what they've produced for
3 2016 to 2019 are these single-page profit loss statements
4 that we're talking about, you know, as part of their
5 production. And this is in the briefing, and I know you
6 don't want us to rehash the back and forth, you know, battle
7 between the parties over discovery, but you know, prior to
8 their production yesterday, which I assume we're going to
9 talk about here in a minute, the vast majority of the
10 documents that they've produced were recycled from an old
11 case, a ten-plus-year-old case. And the only reason I raise
12 that is because if you look through that production -- and
13 they're not easy to find because there's no metadata, it's
14 voluminous -- if you look through that, though, you will
15 find some financial statements from Nomadix's profit loss
16 statements from the 2006 to 2009 time period, so more than
17 ten years ago, that do provide significantly more detail
18 than the single-page statements that we got for 2016 to
19 2019. They're not product specific, but they do suggest
20 that at least ten years ago, Nomadix had more data than
21 they're providing to us.

22 And then the other point that I want to make --

23 THE COURT: Well, so Mr. Carson on that, you
24 know, while I tend to agree with you that I find it hard to
25 believe that a business that you know, has revenues, let's

1 say, in the [REDACTED] range gets one page of, you
2 know, that's our financial analysis, you know, I can't --
3 what I'm inclined to do, not just because Mr. Lezama said
4 it, but because there's limits to what I can do is I was
5 going to suggest, you know, do a 30(b)(6) deposition and
6 find out if there are any other documents. And you know, if
7 there are later, come back and get some sanctions.

8 But any way, I interrupted. That's one point.

9 What's your other point?

10 MR. CARSON: Well, so I'd like to respond to
11 that, but the fact that they're able to generate these
12 reports suggests that they've got the underlying data
13 somewhere. And you know, we're -- I mean, the parties are
14 in dispute as to what exactly was said during a meet and
15 confer a couple weeks ago, but we understood counsel for
16 Nomadix to say that there is a database that contains the
17 underlying financial data, but that they don't regularly
18 generate reports.

19 And the question was asked: Well, do they
20 generate reports on an ad hoc basis for internal analysis,
21 and providing to shareholders, and things like that, and the
22 answer was that they've asked and apparently not. And so --
23 but you know, I don't know how you generate these reports
24 without the underlying data. But you know, I'm not
25 questioning what Mr. Lezama has said today about the

1 documents not existing. And I take your suggestion that
2 there be a 30(b)(6) deposition.

3 A suggestion that I have in advance of that and
4 I think there's precedent for this is that Nomadix -- that
5 someone from Nomadix, a customer, a financial person be
6 required to provide a sworn declaration that describes
7 exactly what they've done to collect documents, what exists
8 in terms of financial documents, so that we know directly
9 from Nomadix before we get into a deposition, you know, what
10 exactly the situation is within the company with respect to
11 these financial documents. Because like you, you know, it
12 just seems kind of implausible that a company would not have
13 more documents than they have.

14 And again, I'm not questioning Mr. Lezama's
15 statements today in any way, but I think the quickest way to
16 get to this and the most efficient way would be to require
17 some sort of sworn declaration from someone at Nomadix who
18 knows to describe what they have, how they keep track of
19 this, and what they've looked for in terms of responding to
20 these requests.

21 THE COURT: Okay. Well, that's not a terrible
22 idea for sure, but I'm not going to do that. You know, you
23 need to get to a live person because, you know, a
24 declaration, an affidavit, whatever it is, it's going to be
25 heavily gone over by lawyers. And you know, you're going to

1 be still wanting to follow up when it's done, so you might
2 as well just cut to the chase and find out what they have.

3 And the other thing is, you know, find out
4 whether this underlying data system, how easily manipulable
5 it is. Because if it turns out that, you know, you can
6 produce this report, you just have to say hold this
7 variable, hold that variable, or do something, yeah, I'm
8 going to order them to produce it. But you don't know what
9 they have, I don't know what they have, and I'm not entirely
10 sure Mr. Lezama knows what they have. So that's what I'm
11 going to do about the financial information is do a
12 Rule 30(b)(6) deposition, do it promptly. And after you
13 find out what it is they have, if anything, that they
14 haven't produced that would be helpful to you, you know,
15 talk to Mr. Lezama and see if they'll just produce it.

16 But if, in fact, they don't have anything more,
17 but you learn that they can, without much effort, produce a
18 report, you know, I'm going to order that they produce it.

19 All right. So let's move on.

20 MS. CHEEK: Your Honor, if I may, this is Andrea
21 Cheek on behalf of Nomadix. I'm happy to address the
22 contents of the database in more detail if that would be
23 helpful at this point. If you'd prefer for us to discuss it
24 offline with Guest Tek's counsel --

25 THE COURT: So I appreciate, Ms. Cheek, the

1 offer, but you know, there's a lot of disputes here, and I'm
2 not actually going to spend all afternoon addressing them.
3 So I think you ought to discuss them offline, but I do
4 appreciate the offer. Thank you.

5 All right. So there's a second area of which
6 has to do with testing, and you know, it's unclear to me
7 what it is that plaintiff specifically thinks there should
8 be that has not been produced other than I gather you've
9 gotten nothing relating to testing; is that right?

10 MR. CARSON: That's right. Could I address that
11 point more generally?

12 THE COURT: Well, but do it quickly.

13 MR. CARSON: Okay. So very quickly. You know,
14 it's really design, development, and testing. Testing is
15 kind of the culmination of that when you test the new
16 feature in a real-world environment. But just to frame the
17 issue very quickly, the core functionality in this case is
18 what Nomadix refers to as share unused or the distribution
19 of unused bandwidth. And that's been our contention from
20 the beginning.

21 Those are primarily the documents that would be
22 relevant to our claims. And as of July 1st, two months ago,
23 if you set aside a user guide and a press release, Nomadix
24 had produced exactly zero documents that related to share
25 unused.

1 They had a production on July 9th that purported
2 to fix that. And again, if you set aside press releases and
3 user guides, we got eight documents that relate to that
4 feature. Eight documents, other than the source code, that
5 relate to the core feature in this core functionality that
6 we've accused.

7 Now, yesterday at 12:30 a.m., they produced
8 nearly 300,000 pages. And you know, we haven't reviewed
9 that, but it does appear that --

10 THE COURT: You haven't?

11 MR. CARSON: No. I apologize, Your Honor.
12 We've not fully vetted those documents.

13 THE COURT: Sorry. I'm trying to be funny here.

14 MR. CARSON: And I'll wrap up here very quickly.
15 There are -- it does appear that there are a significant
16 number of documents in that production that go to this core
17 functionality. And you know -- and I don't know what's in
18 there yet. I don't think it's the technical and testing
19 documents that we're looking for. I think it's
20 correspondence with their customers, their hotel clients --

21 THE COURT: That you asked for?

22 MR. CARSON: That we've also asked for regarding
23 this functionality, but the point is their production is
24 dated. This functionality was not introduced until
25 October 2016. There are very, very, very few documents in

1 their production that relate to this, none that relate to
2 internal design, development, and testing of the feature.
3 And it's those documents that we think we're entitled to. I
4 mean, we are entitled to them. We've asked for them. We've
5 never been told they don't exist.

6 THE COURT: Okay. I've got your point.

7 For Nomadix, Mr. Lezama or Ms. Cheek.

8 MS. CHEEK: Yes, Your Honor. This is Andrea
9 Cheek. I will address this point.

10 And just a few things. First, Mr. Carson
11 describes it as a core functionality of Nomadix's product.
12 I think it's a core feature of their infringement
13 contentions, but not necessarily a core feature of Nomadix's
14 product.

15 And so while we understand their desire for more
16 documents, we have searched for and we have conducted a
17 reasonable search and produced documents related to the
18 functionality. Additionally, we've produced all the
19 versions of the source code that have been accused that have
20 all the, you know, possible details about the functionality
21 that they would --

22 THE COURT: Well, so Ms. Cheek, that's all good.
23 Is it the case that Nomadix puts source code and
24 functionality out there, whether it's the core or not,
25 without testing it?

1 MS. CHEEK: So in one of our recent productions,
2 I don't know if it was. This most recent one or a prior
3 one, we did produce a document that is a fairly
4 comprehensive compilation of testing that has been conducted
5 on the accused products. And I understand that they may not
6 have had a chance to review that yesterday yet or seen that
7 document yet, but that is after, you know, the meet and
8 confer process and continued searching what we located and
9 we have produced at this point.

10 THE COURT: Do you have Bates numbers for this
11 document to help Mr. Carson find it in the 300,000 pages?

12 MS. CHEEK: I do not have the Bates number
13 offhand, but I am happy to send it to Mr. Carson later
14 today.

15 THE COURT: Okay. I will take that as a
16 promise.

17 MR. CARSON: Can I ask a question about that
18 document or --

19 THE COURT: Well, you can ask a question, but --
20 go ahead. Go ahead.

21 MR. CARSON: It was -- I take it it's a single
22 document. I believe Ms. Cheek described it as a summary of
23 testing that was being done. That suggests to me that, you
24 know, there are underlying testing documents that --

25 THE COURT: Actually, it sounds like a

1 procedural book --

2 MR. CARSON: Okay.

3 THE COURT: -- but how do I know. So Ms. Cheek,
4 is the thing that you produced, is it kind of like the
5 company's policies for testing, or is it actually what
6 testing?

7 MS. CHEEK: It's not policies. I think I called
8 it a compilation, but it is sort of a listing of testing and
9 then followed by a more detailed report of the testing. So
10 it is a single lengthy document that's essentially a report
11 of testing that was conducted. And my guess is that most of
12 it is not going to be something that Guest Tek is interested
13 in. If they find things in there and believe that there may
14 be more information on, you know, particular tests that they
15 are interested in, we could certainly consider conducting
16 more detailed searching for, you know, a particular test,
17 but we believe it's a fairly comprehensive document.

18 THE COURT: Okay.

19 MR. CARSON: So Your Honor --

20 THE COURT: Yes, Mr. Carson.

21 MR. CARSON: Just -- I'm sorry. I apologize.
22 One last point.

23 So you know, I think Nomadix is well aware of
24 the particular functionality that's at issue in this case,
25 the features that we've identified. And so you know, this

1 is the sort of piecemeal, we'll give you one document, you
2 know, and a bunch of other documents. And then if you find
3 it, and you look through it, and you see a reference to
4 another document, we'll come back to it, and we'll go look
5 for that. They know the functionality we're interested in.

6 I appreciate that they've got this compilation
7 of testing that covers all sorts of things, not just what
8 we're interested in, but I think they're capable of, you
9 know, doing their due diligence and collecting documents,
10 reviewing that, seeing if it refers to additional testing
11 and providing that to us, particularly given where we are in
12 the schedule.

13 THE COURT: Okay. Well, thank you. You know,
14 when the documents are produced at 12:30 a.m., which means
15 that only one side even knows what we're talking about --
16 and I'm not blaming Ms. Cheek for this -- you know, this
17 procedure of how to resolve these disputes doesn't work so
18 well because it's hard to evaluate. And I can't get
19 anything other than speculation from Mr. Carson.

20 So basically I'm not going to say they know what
21 you're looking for, and they need to follow up on it. You
22 look at what they've produced, which Ms. Cheek is going to
23 do what she said and tell you exactly where it is, and you
24 all talk about it and see whether there's something else
25 that is reasonably necessary to do.

1 You know, from my point of view, what you are
2 trying to find out here is whether or not Nomadix tested the
3 functionality which is the functionality that you've
4 accused. If they did, I'm not sure how much more followup
5 is needed.

6 So in any event, let's move on here. As I
7 understood it, this source code computer issue, a few days
8 ago Nomadix sent it back to Guest Tek.

9 So is that kind of resolved for the time being?

10 MR. CARSON: If I could address that, Your
11 Honor. It was sent back. I believe we received it Friday
12 of last week. And they had it in their possession nearly
13 two months.

14 The issue, though, is that we've got the
15 computer back, but we're not able to allow our experts to
16 view the code. We had an agreement from Nomadix a few
17 months ago that while there were stay-at-home orders in
18 place, we could ship the computer to our experts' home where
19 they could review it there.

20 The stay-at-home orders have been lifted, but
21 the travel concerns that our experts legitimately have --

22 THE COURT: Well, so I get your point of view
23 there, Mr. Carson.

24 Mr. Lezama or Ms. Cheek, is there any reason why
25 this procedure that was good enough a few months ago

1 shouldn't be continued at this point, notwithstanding the
2 fact that maybe there are no stay-at-home orders anymore?

3 MS. CHEEK: Yes, Your Honor. I think you can
4 certainly appreciate that at the time the initial
5 stay-at-home orders were issued, none of us anticipated that
6 this many months later we would still be in this position.
7 And so while we did, you know, try to make sort of
8 extraordinary accommodations for a way that we would not
9 normally handle our source code, we don't think it's
10 appropriate to continue that long term. As you know, these
11 are referred to as the crown jewels of the company, and
12 Nomadix goes to great lengths to protect its source code.

13 During our most recent meet and confer, Guest
14 Tek's counsel had proposed a potential alternative, and I
15 wasn't clear whether this would, you know, satisfy them or
16 just something that they were putting out there for
17 discussion, but suggesting that they could ship the source
18 code to their offices in different cities which they seem to
19 have an office located in the same city as all of their
20 experts.

21 And I think with appropriate parameters and
22 restrictions, understanding, you know, where the source code
23 is located at any given time and that it's otherwise being
24 maintained as required by the protective order, you know, in
25 a locked room and in their outside counsel's office, I think

1 that's something that we are amenable to.

2 It looks like one of their experts is in Seattle
3 where the source code has been maintained since we
4 originally produced it. And I believe their other experts
5 are in Chicago and Los Angeles where Guest Tek's outside
6 counsel also has offices.

7 So I think there are a few details to work out
8 about that, but if that's still an offer that Guest Tek is
9 making, that's a potential compromise that we could reach.

10 THE COURT: Mr. Carson.

11 MR. CARSON: Yes, we did propose that as a
12 fallback a couple weeks ago during a meet and confer. We
13 had not heard back yet until today, but our view is that
14 under the current protective order, you know, it doesn't
15 preclude our doing that, our sending the code to our Chicago
16 office for viewing by our expert there, our LA office, and
17 our Seattle office. And we ask that Nomadix confirm that
18 that's their reading of the protective order, that it
19 wouldn't preclude that sort of an arrangement.

20 THE COURT: Well, that sounds like what
21 Ms. Cheek just said would be okay; right?

22 MR. CARSON: She did. I think she suggested we
23 needed some further sort of agreements in addition to the
24 protective order. If I misunderstood her and we're able to
25 go ahead with that, assuming that the parties adhere to the

1 current protective order, then we're prepared to proceed in
2 that manner.

3 THE COURT: Ms. Cheek.

4 MS. CHEEK: Yes. I think we're generally in
5 agreement. I believe -- I don't have the protective order
6 in front of me, but I believe it kind of refers to outside
7 counsel of record. And I don't know whether they have
8 counsel of record in those other offices. I think we would
9 just want someone designated who is sort of responsible for
10 the source code and where it's located that has at least,
11 you know, read and agreed to abide by the restrictions in
12 the protective order as far as maintaining the source code
13 and in those offices as the protective order requires. But
14 otherwise, I don't think we have any significant
15 disagreement on what the protective order permits.

16 THE COURT: Now, Mr. Carson, getting somebody in
17 each of your offices to sign the order and to do their duty,
18 you can live with that?

19 MR. CARSON: Yes, definitely. We can work with
20 that.

21 THE COURT: Okay. Well, then I'm going to
22 construe the order based on your joint representation as
23 permitting it, and so that matter is resolved.

24 All right. And so then there's the close of
25 fact discovery issue, but let's save that until we now look

1 at Nomadix. All right.

2 So Nomadix has an interesting proposed order
3 because the first thing they want to do is to say there's a
4 date for final infringement contentions, and the plaintiff
5 has to live with their final infringement contentions which
6 is generally what I would understand to be meant by final
7 infringement contentions.

8 And so, Mr. Carson, recognizing that maybe
9 September 10th is not that date, when are you prepared to
10 provide final infringement contentions or to commit to
11 providing --

12 MR. CARSON: Well, Your Honor, it depends on
13 what the close of fact discovery ends up being.

14 THE COURT: Okay. Well, say it in relation to
15 that.

16 MR. CARSON: With respect to the October 30th
17 deadline, you know, we would want a few things before we
18 supplement. We need to review the documents that were just
19 produced.

20 THE COURT: Yes.

21 MR. CARSON: We need to review the new source
22 code, and we would need to depose their individuals which
23 we've not done thus far because we don't have the documents
24 that we needed. So you know, we would propose to supplement
25 and finalize our contentions before the close of fact

1 discovery toward the end of October.

2 And I would point out that, you know, we've
3 never -- the parties have never built in a "final
4 contentions date." I think in the normal course, absent
5 that date, the final date is the close of fact discovery.
6 If you don't supplement your contentions and the
7 interrogatories that go to those contentions by that date,
8 well, then you're stuck with whatever the current
9 contentions have to say. But we're not opposed to --

10 THE COURT: One of the problems with the final
11 date being October 30th is exactly what the defendants
12 identify which is you say a bunch of new things for the
13 first time and what can they do about it?

14 MR. CARSON: Well, I mean, expert reports will
15 follow that.

16 THE COURT: Yeah. Yeah. But the point is
17 sometimes your contentions deserve fact discovery. I mean,
18 to the extent it's just an argument between the parties, I
19 mean, yeah, there's no harm.

20 So let me just ask: Are all the lawyers who are
21 in this case, who I take it none of you are members of the
22 Canadian bar, are you all tied up in this Canadian trial, or
23 is it just your clients that are tied up in the Canadian
24 trial?

25 MR. CARSON: Your Honor, it's our clients that

1 are tied up in the Canadian trial. The attorneys involved
2 in those cases are based in Canada.

3 MR. LEZAMA: So for Nomadix, though, we do
4 expect that U.S. counsel will be, you know, involved in
5 strategy and discussions with the Canadian counsel and --

6 THE COURT: Are you expecting to be in Canada
7 for the trial?

8 MR. LEZAMA: No. We will not be going -- the
9 Canadian trial will be -- my understanding is that it will
10 be entirely remote.

11 THE COURT: Okay. All right. So it's
12 September 3rd. I think you can come up with final
13 infringement contentions tentatively by October 16th. And
14 you know, if there's some problem because of depositions, or
15 something else, or you learn something in a deposition after
16 October 16th, you know, that could be the good cause you're
17 looking for. But if you've got the source code, which
18 theoretically you do now, and maybe you've got another
19 300,000, I don't know whether it's documents or pages, but
20 you've got a lot more paper to look at. And I do generally
21 think that your infringement contentions ought to be fairly
22 well set by October 16th or it ought to be something that
23 you can produce by then. So I'm going to basically change
24 the date from September 10th to October 16th and sign off on
25 that one.

1 The next thing is these interrogatories two,
2 five and seven. And I looked at --

3 MS. YING: Your Honor, this is Jennifer Ying.
4 If we could go back to the contentions issue. To the extent
5 that we're required to provide final contentions on
6 infringement, typically you also see final invalidity
7 contentions as corresponding as well to. When would Your
8 Honor propose --

9 THE COURT: What would you propose, Ms. Ying?

10 MS. YING: You know, I think I would -- I guess
11 we could talk about it with Nomadix, but I think it makes
12 sense that if we're going to be required to provide our
13 final infringement contentions, that similarly final
14 invalidity contentions would be set before the close of fact
15 discovery as well.

16 THE COURT: Mr. Carson. Or no, you're on her
17 side.

18 Mr. Lezama or Ms. Cheek.

19 MR. LEZAMA: Yeah, that's fine. I do want to
20 just briefly note I think Ms. Cheek lost connection, so
21 maybe give her a minute to rejoin, but I can handle this
22 topic. You know, we are fine with providing final
23 invalidity contentions on similar terms, but we would like
24 sufficient time to review the infringement contentions and
25 respond accordingly. You know, I would suggest that at

1 least four weeks --

2 THE COURT: Well, so --

3 MR. LEZAMA: -- to do that.

4 THE COURT: -- if you do four weeks, then you're
5 like into -- I mean, you mean four weeks from when they do
6 theirs, not four weeks from today; right?

7 MR. LEZAMA: Correct.

8 THE COURT: So yeah, four weeks from when they
9 do theirs is like, you know, two weeks after fact discovery
10 closes.

11 MR. LEZAMA: If we're setting it at
12 October 30th, yes.

13 THE COURT: Okay.

14 MR. LEZAMA: I mean, I think there's got to be
15 some allowance for --

16 THE COURT: No, I agree. So here's actually
17 what we can do: I'm going to make your deadline
18 October 30th, but I'm going to say that the fact discovery
19 can go on for two weeks after that. You can tighten up a
20 little on expert discovery and still allow me plenty of time
21 to decide your motions. But you ought to -- you know, it's
22 less important generally for invalidity contentions unless
23 you're actually dealing with discovery of, you know, a
24 system or something as opposed -- and maybe you are, I don't
25 know -- as opposed to just prior art that's paper

1 publications and, you know, discovery doesn't actually
2 usually matter.

3 But two weeks is enough. And you can have two
4 weeks of discovery after that.

5 So interrogatories two, five and seven --

6 MR. CARSON: Your Honor, I apologize. If I
7 could just address one other issue with the extension.

8 Another condition that they placed on an
9 extension was that we would not be entitled to any further
10 written discovery.

11 THE COURT: Yeah. I think that's a reasonable
12 thing. You have enough problems with the written discovery
13 that's already out there. You know, I would distinguish
14 that a little bit from particular follow-up discovery that
15 comes from doing a Rule 30(b)(6) deposition or something
16 else, but no more just general interrogatories or requests
17 for production of documents.

18 MR. CARSON: The only thing that I have in mind
19 are things that may come out of the 300,000-plus pages that
20 have just been produced. I don't know what we may learn
21 from that.

22 THE COURT: Well, I don't know what you may
23 learn from it, either. So when you've actually reviewed
24 them and, you know, I understand you couldn't possibly have
25 reviewed them in time for this, you know, you can talk with

1 them. But it is time to try to bring all of this to a head,
2 and so you should not count on getting any more written
3 discovery. I would think that you've asked enough things
4 now so that anything that you actually want is at most
5 followup to discovery you've already requested.

6 Okay. So the second thing was Nomadix wanted
7 Guest Tek to answer interrogatories two, five and seven
8 completely. Besides for the fact that I don't order
9 complete responses because who knows what that possibly
10 means, I looked at that.

11 And interrogatory number two which wants
12 plaintiff to claim priority dates for every claim in the
13 three patents that are left that's after March 16th of 2013,
14 I just don't think that's a burden that's on the plaintiff,
15 and so I'm not going to make them respond to that, period.

16 Interrogatory number five which is a request
17 that plaintiffs identify third parties that practice the
18 patent which I take to be related to non-infringing
19 alternatives, I think the first thing is defendant needs to
20 identify what it thinks the non-infringing alternatives are.
21 And then plaintiff can, you know, say or not say if they --
22 you know, if they think that it's actually an infringing
23 alternative, well, then they can do a chart, a claim chart
24 showing why it's an infringing alternative. But I'm not
25 going to make them respond to an interrogatory saying

1 identify every third-party product in the world that
2 practices the patents.

3 And so interrogatory number seven which is the
4 damages which I believe relates to the commercial success of
5 the OVI; is that right?

6 MR. CARSON: Interrogatory seven asks for Guest
7 Tek's damages theory, in essence. I don't have the exact
8 language, but it's not tied on OVI. It's the next issue
9 that's the OVI issue.

10 THE COURT: Okay. Well, so the damages theory,
11 you know, I looked at. To some extent, I started looking at
12 the interrogatories, but I don't recall actually seeing what
13 you had said about interrogatory -- what your current answer
14 is to number seven.

15 Do you have any actual information of any use in
16 response to interrogatory number seven yet?

17 MR. CARSON: We -- not yet, Your Honor, and the
18 reason for that was because we didn't have the documents
19 that we thought we needed to --

20 THE COURT: Well, so you know, that carries you
21 so far. As I understand it, you're not pursuing a claim of
22 lost profits; right?

23 MR. CARSON: That's right.

24 THE COURT: And so presumably you are pursuing a
25 claim of a reasonable royalty which you don't know how many

1 units, or maybe you do. But usually with the reasonable
2 royalty, I would think is that you have in mind some number
3 which is the percentage, multiply it against some product
4 which is how you're going to calculate a reasonable royalty;
5 right?

6 MR. CARSON: It is, Your Honor, but that
7 analysis, as I'm sure you can appreciate, is caught up in
8 all sorts of issues of profitability and costs, and the
9 incremental value of certain features, all of which flows
10 from, you know, financial documents that we don't have. And
11 I think also will flow, in part, from technical documents
12 that, you know, we received, I guess a day and a half ago at
13 midnight, 300,000 pages of which. So it's a complicated
14 analysis, but --

15 THE COURT: So I understand you, Mr. Carson.

16 Mr. Lezama, what exactly is it you're expecting
17 them to tell you at this point that would be helpful?

18 MS. CHEEK: Your Honor.

19 MR. LEZAMA: Go ahead. I'm sorry.

20 MS. CHEEK: Sorry, I'm back.

21 THE COURT: You're back.

22 MS. CHEEK: Sorry, Your Honor.

23 THE COURT: That's all right. We have these
24 technical problems. You know, I've dropped off these calls
25 before so I'm pretty -- you know, I understand nobody's

1 dropping off intentionally.

2 Go ahead, Ms. Cheek.

3 MS. CHEEK: Yeah. So certainly we understand
4 that, you know, to the extent they believe they're going to
5 be relying on documents that we've either just recently
6 produced or have not produced yet, we're not seeking to
7 preclude them from updating their theories to address any
8 insight that they gain from those documents, but we also
9 find it hard to believe that they have no present theory on
10 what the reasonable royalty should be.

11 There, as you know, are a number of factors that
12 go into that analysis beyond Nomadix's profitability on the
13 products, including many things that should be in Guest
14 Tek's possession. You know, their own documents, their own
15 licensing practices, their own view of the relevant market.

16 THE COURT: Well, so let me ask: Has Guest Tek
17 ever licensed these three patents before?

18 MS. CHEEK: I don't know. I'll let Guest Tek's
19 counsel answer that.

20 MR. CARSON: I don't believe we have, but I'm
21 hesitant to give you a definitive answer.

22 THE COURT: Okay. Has Nomadix taken any
23 licenses to -- well, first off, just generally, I guess
24 you've been in business 20 years. You must have taken some
25 licenses.

1 MR. LEZAMA: I can respond to that. We have
2 licensed our patents. And as far as I'm aware, any patent
3 rights that we've received have been included in our
4 outgoing licenses and those have been produced.

5 THE COURT: Okay. So you have licensed some
6 things, Mr. Lezama, and you've taken some licenses.

7 MR. LEZAMA: Yeah. I don't know that they were
8 necessarily termed licenses, but they may have been
9 covenants not to sue, things like that.

10 THE COURT: Okay. And you've produced that so
11 plaintiff has that?

12 MR. LEZAMA: Yes. Correct.

13 THE COURT: All right. Well, here is what I
14 think is I think plaintiff by October 15th or 16th, the
15 date, that I think they ought to supplement that
16 interrogatory with some theory that is your best effort at
17 the time, you know, which may in the end -- the actual
18 royalty number may not be -- it may not be worth the paper
19 it's printed on, but it seems to me that to the extent that
20 plaintiff has factual information that they think goes into
21 the royalty analysis, they ought to say what it is even if
22 it's incomplete.

23 So I am going to direct you to supplement your
24 answer. I don't expect a complete answer, but I do expect
25 that it should be something other than just a complete

1 mystery as to what your theory is. And I can't be anymore
2 specific than that. That's the reason why I'm just going to
3 say you need to supplement your answer. But how you
4 supplement it in the end is a question for you to figure
5 out.

6 All right?

7 MR. CARSON: Yes, Your Honor.

8 THE COURT: Okay. So there was this question
9 about OVI source code which, as I understand it, plaintiff
10 said, well, we don't know whether we have the complete
11 source code for 2010 or 2011 OVI, but we'll look around for
12 it. And if we have it, we'll produce it.

13 Is that where we are?

14 MR. CARSON: Not exactly, Your Honor. So the
15 document request asked for source code for all of Guest
16 Tek's patented instrumentalities, and that term was defined
17 in the request. And so we've read that to, I think,
18 reasonably seek source code for which we believe has
19 functionality that falls within the scope of the asserted
20 patents. And so we have produced OVI source code, 80
21 versions of that going back to 2012.

22 Now, as I understand it, there was a launch in
23 early 2011 and we do have -- and that launch, as I
24 understand it, did include some of the functionality that's
25 captured by these asserted patents. And we do have OVI

1 code. In addition to those 80 versions, we've been able in
2 the last couple of days to find some code from 2011. And
3 we're certainly willing to produce that code as well which
4 we believe falls within the scope of that request.

5 I believe, though, what Nomadix is looking for
6 is code that's older than that, older than the early 2011
7 launch, and that is code that we have not agreed to produce.
8 My understanding is that the OVI product launched in 2011.
9 So to the extent they're looking for code that predates
10 2011, it would be code for a predecessor product with a
11 completely different name.

12 And two responses to that, if I've characterized
13 their requests accurately. Number one, I don't think the
14 request asks for that because it's not a Guest Tek patented
15 instrumentality. It's some older code that we've got that
16 they think might be prior art in some way. I'm not sure.

17 But to the extent that's their theory, they've
18 never alleged that in their complaint or in their invalidity
19 contentions. They've never put forth any sort of, you know,
20 reasonable basis for asserting that that older product is
21 prior art based on user guides, publicly available
22 documents.

23 And as Ms. Cheek, you know, suggested earlier,
24 source code is very sensitive. You know, it's the crown
25 jewels of the company. We don't know why -- so we don't

1 feel like we should have an obligation to produce source
2 code if they've not even made a good faith allegation that
3 it's relevant in any way to their case. So we're willing to
4 go back and produce the 2011 versions that we've recently
5 found, but we don't think the request extends to older
6 products, and we don't think, even if it does, that they're
7 entitled to that code.

8 THE COURT: Mr. Lezama or Ms. Cheek.

9 MS. CHEEK: Yes, Your Honor. So I think
10 Mr. Carson does characterize the dispute accurately except
11 that what we are also looking for in addition to the 2011
12 code is the 2010 code which we believe is OVI Version 5.
13 They may have other names for that product as well, but I
14 believe that's been, you know, covered in other litigation
15 between the parties that there is earlier OVI versions,
16 specifically OVI Version 5 that we believe was available in
17 approximately 2010 and that we believe we're entitled to to
18 evaluate whether that version also falls within the scope of
19 the asserted claims.

20 MR. LEZAMA: Can I also add just one point? So
21 yes, definitely, you know, the product that was available in
22 2010 is referred to by Guest Tek in its own documents as OVI
23 Version 5. In addition, we have OVI Version 5 series code.
24 It's like 5. -- I don't know -- 5, 6, or something like that
25 from 2011. So the likelihood that there is, you know, some

1 super sensitive trade secret that we're going to obtain by
2 looking at, you know, the version of OVI 5 from 2010, you
3 know, is extremely low. I mean, you know, the likelihood is
4 that there are going to be only incremental changes from
5 2010 to 2011.

6 As Mr. Carson has mentioned, we have over 80
7 versions of source code produced. And just to be clear,
8 that was produced in the California case. We've agreed it
9 can be used in this case, but it's not like it was produced
10 for this case.

11 And you know, this goes to prior art. They've
12 contended that OVI falls within the scope of the claims, and
13 we're just looking to see whether there's been a 102(b)
14 on-sale bar, and we can't know that until we see the source
15 code.

16 MR. CARSON: Your Honor.

17 MR. LEZAMA: I don't think it's fair to impose a
18 condition that we make some sort of, you know, allegation in
19 a pleading subject to Rule 11 when, you know, we can't
20 really make that allegation until we see the source code.

21 MR. CARSON: Your Honor, if I could respond to
22 that. So it's news to me that they've got the 5.6 code. I
23 guess it was produced to them in the California case. If it
24 was produced to them in the California case, it was produced
25 to them at least two years ago, if not more, and they've

1 certainly had plenty of time to analyze that source code and
2 put forth some sort of basis for asserting that, not only
3 that 5.6 code, but earlier versions of that code meet the
4 limitations of the patent. And they've not provided any
5 such analysis. So --

6 THE COURT: So I get what you say there. So
7 Mr. Lezama, 5.6, you have that code?

8 MR. LEZAMA: Just to be clear, I made 5.6 up. I
9 don't know what the precise version number is. It's --

10 THE COURT: Well, the earliest version that you
11 have, does it meet the limitations of the patent?

12 MR. LEZAMA: We hadn't looked at it for that
13 reason because it's too late, you know, as far as we
14 understand. I mean, it's -- you know, why would we have
15 looked at it for this case and for that purpose.

16 THE COURT: Well, in other words, you keep
17 asking -- you're saying you'd like to look at the 2010
18 because you think it would be -- there wouldn't be that much
19 change, but apparently you don't even know whether the more
20 recent versions have the functionality that's at issue;
21 right?

22 MR. LEZAMA: Well, I mean, the thing is that
23 it's -- you know, we're not necessarily contending that any
24 of the versions have them. Guest Tek is the one who said
25 that OVI falls within the scope of the claims, and they

1 haven't really explained why they think that's the case.

2 THE COURT: Well, so --

3 MR. LEZAMA: But we want to be able to take a
4 look at the older code and compare it to the code that, you
5 know -- the versions that they do contend practice the
6 claims and compare them. And we -- it may not be our
7 position that the claims should be construed the way that
8 Guest Tek is reading them, but we may have a position that,
9 well, if this satisfies the claims, then the prior art
10 device does.

11 THE COURT: Well, so construction of the claims
12 is something that I have already done, so you know, you all
13 arguing about how you can construe the claims, that's
14 supposed to have been resolved.

15 So you're telling me, Mr. Lezama, you have no
16 current invalidity allegations of an on-sale bar; is that
17 right?

18 MR. LEZAMA: With respect to OVI, I don't
19 believe so.

20 THE COURT: Okay. Well, then I'm not going to
21 require that they produce the 2010 source code because
22 essentially it's pursuing an invalidity theory that's not in
23 the case. And so I'm not going to require them to do that.

24 And I think the last thing --

25 MR. LEZAMA: Can I interrupt for just a moment?

1 I take it that if we do conclude we have a basis to make
2 that allegation and make that allegation, they should
3 produce the source code?

4 THE COURT: Well, that would be a different
5 thing, but you know, probably a good idea that I only rule
6 on actual disputes, not hypothetical disputes.

7 So the last thing on the list here is that
8 there's a request for production, Items 30 and 37, which
9 relate to financial documents relating to, I guess, sales of
10 OVI at some relevant time because plaintiff says that that's
11 a commercial embodiment of the patents.

12 Is it right, Mr. Carson, that OVI, at least at
13 some point, is a commercial embodiment of the patents, in
14 your view?

15 MR. CARSON: Yes, we have made that
16 representation.

17 THE COURT: Okay. And so I thought I saw
18 actually that you said you were going to produce financial
19 documents about the profitability and commercial success of
20 OVI; is that right?

21 MR. CARSON: That's right. We're looking for
22 those documents. We believe that we found some documents
23 that are responsive. Our understanding from Nomadix from
24 the meet and confer, based on the fact that we're not
25 seeking lost profits, only a reasonable royalty is that

1 they've agreed to narrow their requests. They're not
2 seeking all financial documents which is what they were
3 looking at before, but just high-level documents that would
4 provide information on revenue and cost with respect to the
5 OVI products. And those are the type of documents that we
6 believe we've located and are preparing to produce.

7 THE COURT: And how far back are you producing
8 them?

9 MR. CARSON: I don't have the answer to that off
10 the top of my head. I apologize for that, Your Honor. I
11 don't have an answer for you. I don't know how far back
12 they go, and I don't know how far back our data goes.

13 THE COURT: Okay. So you say you think you
14 found some documents. When are you going to produce these
15 documents?

16 MR. CARSON: Well, they were just sent to me
17 today, so we've got to look at them and make sure that
18 they're responsive and they're narrowly tailored, but I
19 think certainly by next week we'll be able to produce them.

20 THE COURT: Okay. Anymore comment on that?

21 Ms. Cheek.

22 MS. CHEEK: Yeah, just one followup. Thank you,
23 Your Honor.

24 We would be interested in them understanding
25 where they are drawing the line to the extent that they are

1 searching and locating documents that they are deciding they
2 don't need to produce because they think they are too
3 detailed or too comprehensive. You know, we still think
4 those documents are relevant to the reasonable royalty
5 analysis, and they haven't identified any burden in
6 producing them. And so we're just interested in what line
7 they're drawing as far as what they are producing and what
8 they are withholding.

9 THE COURT: Yeah. Well, I'm not sure that
10 Mr. Carson at this point could say what they're withholding
11 because he hasn't looked at the documents. And absent him
12 saying whatever his request was, which probably is protected
13 by some kind of privilege, I'm not sure that we can make a
14 whole lot more progress on that right now.

15 MS. CHEEK: I guess we would just want to
16 reserve the right to, you know, seek further discovery
17 depending on what they produce.

18 THE COURT: Well, so basically, though, what
19 you're looking for for the OVI is you're looking for, I
20 assume, how many units are sold and what the profitability
21 is. And if you get those two things, isn't that pretty much
22 going to tell you what you need for reasonable royalty and
23 tell you also whether or not there's an argument for or at
24 least a financial part of an argument for commercial
25 success?

1 MS. CHEEK: Yeah. I think at a high level,
2 those are -- that's the type of information we're looking
3 for. You know, certainly the more detail on what goes into
4 their profitability, you know, the more helpful it could
5 potentially be to the analysis. And so we are, you know,
6 interested. If they have more comprehensive documents that
7 they're just not planning to produce, we don't think that's
8 appropriate.

9 THE COURT: Well, so I guess you two have to
10 talk to each other a bit. You know, there was something in
11 the briefing and you -- at least one, maybe both of you have
12 sort of referred to it as you've had some discussions about
13 what's reasonable to produce in relation to this issue. And
14 it sounds like you don't have a final agreement, but I think
15 that if you talk to each other, I don't think the documents
16 have to be incredibly detailed to give you, Ms. Cheek, what
17 you need or I suppose for Mr. Carson to be able to give to
18 his expert for that expert to offer reasonable opinions or
19 fact-based opinions.

20 I don't know. Is there something else one or
21 the other side wants me to do about this right now?

22 MR. CARSON: Your Honor, I think this falls into
23 the category of a hypothetical dispute. I think, you know,
24 we've got some documents that we think are consistent with
25 our meet and confer discussion, and again, we'll be

1 producing those here.

2 THE COURT: So, yeah, you said you're going to
3 produce them shortly. It's practically the end of the week
4 now. So if you produce them next week, that is pretty
5 shortly. And presumably there won't be 300,000 of them, and
6 so Ms. Cheek will have an opportunity to look at them and
7 figure out whether it gives her what she needs. So why
8 don't we leave it at that.

9 All right. So I think we've touched on pretty
10 much everything that's in these two letters. What I would
11 appreciate for the parties to do, because in the give and
12 take of these discussions, I'd like you to try to reduce
13 what I've said to some kind of jointly understood order that
14 I will sign so that if there's an argument about what I've
15 said, and you know, I hope there won't be, but it's not
16 beyond the realm of possibility, that there will be some
17 order signed by me that says how I've resolved all these
18 various disputes.

19 So if you all can also meet and confer about
20 that and submit something some time next week, I would
21 appreciate it. And I guess in terms of the just general
22 overall schedule of discovery cutoff being November, I think
23 I said -- I'm not sure what I said, but I think if
24 October -- you know, two weeks beyond whenever it was that
25 you all -- October 30th. So that's probably about

1 November 13th or something like that. And if you work out
2 whatever, your expert discovery and, you know, the rest of
3 the schedule, if you would submit something on that, too,
4 that would be good.

5 All right? Are we done?

6 MR. CARSON: Yes, Your Honor. Thank you.

7 MR. LEZAMA: Yes. Thank you, Your Honor.

8 MS. CHEEK: Thank you, Your Honor.

9 MS. YING: Thank you, Your Honor.

10 THE COURT: Okay. Well, thank you all.

11 Hopefully, I won't see you again for a while. But in any
12 event, I'm going to hang up now and have a nice day.

13 (Discovery dispute videoconference was concluded
14 at 3:22 p.m.)

15 I hereby certify the foregoing is a true and
16 accurate transcript from my stenographic notes in the
17 proceeding.

18 /s/ Heather M. Triozzi
19 Certified Merit and Real-Time Reporter
20 U.S. District Court
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CERTIFICATE OF SERVICE

I, Kenneth L. Dorsney, hereby certify that on September 29, 2020, the attached document was electronically filed with the Clerk of the Court using CM/ECF which will send notification to the registered attorney(s) of record that the document has been filed.

I further certify that on the same date the attached document was electronically mailed to the following person(s):

Jack Blumenfeld
Jennifer Ying
MORRIS, NICHOLS, ARSHT & TUNNELL LLP
1201 North Market Street
Wilmington, Delaware 19899
jblumenfeld@mnat.com
jying@mnat.com

Attorneys for Plaintiff
Guest Tek Interactive Entertainment Ltd.

Daniel J. Goettle
BAKER & HOSTETLER LLP
2929 Arch Street
Cira Centre, 12th Floor
Philadelphia, PA 19104
dgoettle@bakerlaw.com

Charles C. Carson
Jeffrey W. Lesovitz
BAKER & HOSTETLER LLP
1050 Connecticut Avenue, NW, Suite 1100
Washington, DC 20036
ccarson@bakerlaw.com
jlesovitz@bakerlaw.com
Guest-Tek@bakerlaw.com

Michael J. Swope
BAKER & HOSTETLER LLP
999 Third Avenue, Suite 3600
Seattle, WA 98104
mswope@bakerlaw.com

Andrew Samuels
BAKER & HOSTETLER LLP
200 Civic Center Drive
Suite 1200
Columbus, OH 43215
asamuels@bakerlaw.com

Attorney for Plaintiff
Guest Tek Interactive Entertainment Ltd.

Dated: September 29, 2020

/s/ Kenneth L. Dorsney

Kenneth L. Dorsney (#3726)

MORRIS JAMES LLP

500 Delaware Avenue, Suite 1500

Wilmington, DE 19801

(302) 888-6800

kdorsney@morrisjames.com

Attorneys for Defendant Nomadix, Inc.